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# IN THE SUPREME COURT OF GEORGIA

**SEPTEMBER TERM, 1944**

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**Number 14,971**

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PARKE, DAVIS AND COMPANY

*versus*

J. EUGENE COOK, AS COMMISSIONER OF THE STATE REVENUE DEPARTMENT

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## STATEMENT OF JURISDICTION

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In this suit, it was sought to recover taxes alleged illegally to have been paid, on the ground that the exaction of such taxes was contrary to the Constitution of the United States, as is more fully set out in the assignment of errors. Jurisdiction in the Supreme Court of Georgia existed because a constitutional question was involved, which question was decided against petitioner by the Supreme Court of Georgia in its final judgment.

This suit was authorized in the form in which it was brought by *Georgia Code, Sections, 92-3308 and 92-3310,* taken from the *Acts of 1931, Extra Session, pages 54 and 55.* Copies of these sections are attached hereto. The defendant in error contended that these sections could not

be followed in this case. However, as that issue was decided in favor of the plaintiff in error in the Supreme Court of Georgia, discussion with reference thereto is not necessary.

The statutes here involved are the *Act of the Georgia Legislature approved March 30, 1937*, now the *Code Sections above*, and *Sections 92-3002, 92-3109, and 92-3113*. The applicable provisions of the *Act of March 30, 1937*, now *Section 92-3113 of the Code*, are printed in *Georgia Laws of 1937, pages 109-148*. These provisions are: *Section 1, paragraph n, page 114; Section 8, paragraph a, page 126;* and *Section 9 in full, pages 129 to 133, inclusive*, copies of which are attached hereto.

Jurisdiction of the Supreme Court of the United States arises under the provisions of *Judicial Code, Section 237; U. S. Code, Title 28, Section 344, paragraph (a)*.

The date of the judgment of the Supreme Court of Georgia is October 13, 1944, and the date of filing this petition for appeal is November 1, 1944.

The rule which may be said to have been definitely established by the Supreme Court of the United States is that no formula of apportionment can be upheld if it is arbitrary, burdens interstate commerce, or denies due process of law or equal protection of law.

If the business of the corporation within the taxing state is independently conducted, or the income derived therefrom is separable, no formula of apportionment may be applied, for "theories of allocation can have no place in the inquiry if the net income within the state stands on its own footing unmixed with outside business."

Without reference to any other question, it is apparent from a consideration of the statute that the "sales ratio" factor of the Georgia apportionment formula is inherently arbitrary on its face, with the result that the effect of

applying it is necessarily to subject to taxation by the State income not derived from property owned or business done in the State.

The apportionment formula embodies three factors which are given equal weight in computing the proportion of the entire net income of the corporation which the State will tax. Any formula of apportionment to be sustainable, must have a reasonable relation to the business of the corporation. *Alpha Portland Cement Company* versus *Massachusetts,* 268 U. S. 203.

In no case can the State levy a tax on, or based on, gross receipts from interstate transactions, or discriminate against interstate commerce in the admeasurement of a net income tax. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *J. D. Adams Mfg. Co.* v. *Storen,* 304 U. S. 307; *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434.

It has definitely been established that gross income earned throughout the country cannot be made the basis of an income tax within a state. This is the decision in the three cases next above, and in the *Adams Manufacturing Company* case, the Court said:

> "We conclude that the tax is what it purports to be,—a tax upon gross receipts from commerce. * * * The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article 1, Section 8, of the Constitution."

It is also respectfully submitted that cases cited by the Supreme Court of Georgia in its opinion herein do not sustain that opinion, and are not in conflict with the broad principle stated above. The principle which we contend applies here is supported by: *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, cited and followed: *United States* v. *Rock Royal Corporation*, 307 U. S. 563, 568, 569; *Mulford* v. *Smith*, 307 U. S. 38, 48; *Currin* v. *Wallace*, 306 U. S. 1, 10.

The opinion of the Supreme Court of Georgia, sent up as part of the record, is made a part of this statement, and should be attached hereto when this statement is printed. Also attached hereto are copies of the procedural and apportionment sections of the statutes of Georgia involved here. This statement is made to conform to Rule 12 of the Rules of the Supreme Court of the United States, and specifically, attention is directed to the provisions of paragraph 3 of said Rule.

WHEREFORE, it is respectfully submitted that the jurisdiction of this Court lies, and this appeal is the correct way of invoking that jurisdiction.

This 1st day of November, 1944.

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## APPENDIX "A"

Copy of Section 92-3308, Georgia Code of 1933:

"*92-3308.* Claim for Refund; Limitations; Hearing; Interest.—A taxpayer may file a claim with the State Revenue Commission for the refund of any tax assessed against him, at any time within three years from the time of payment of the tax, whether or not the tax has been paid under protest. The Commission shall grant a hearing thereon, and if upon such hearing it shall be determined that there has been an overpayment of any tax imposed by this law, the amount of such overpayment shall be refunded to the taxpayer, together with interest at six per centum per annum from the date of such overpayment. (Acts 1931, Extra. Sess., p. 54; 1931, pp. 7, 35.)"

Copy of Section 92-3310, Georgia Code of 1933:

"*92-3310.* Suit for Recovery of Tax Illegally Assessed or Collected; Conditions Precedent; Limitations.—No suit or proceedings shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, or of any penalty or interest claimed to have been excessive or in any manner wrongfully collected, until a claim for refund has been duly filed with the State Revenue Commission; no such suit or proceeding shall be begun before the expiration of three months from the date of filing such claim, unless the Commission renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax or penalty, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commission shall, within 90 days after any such disallowance, notify the taxpayer by mail. (Acts 1931, Extra. Sess., p. 55; 1931, pp. 7, 35.)"

Copy of Paragraph (n), Section 1, of An Act to Amend Title 92 ("Public Revenue"), etc., as printed on page 114, Georgia Laws, 1937:

"(n) The word 'sale or sales' wherever appearing in this Act for the purpose of apportioning net income to

Georgia shall be deemed to be the total value of all sales made through or by the offices, agencies, or branches located within this State, regardless of the destination."

Copy of Paragraph (a), Section 8, of above Act, as printed on page 126, Georgia Laws, 1937:

"(a) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries, or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition of the continued use or possession, for the purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he had no equity. Expense incurred in earning non-taxable income is not an allowable deduction from the taxable income before computing the tax."

Copy of Section 9 of above Act, as printed on pages 129-133, inclusive, Georgia Laws, 1937:

"Section 9. That Title 92, Division 1, Part 9, Chapter 92-31, of the Code of Georgia of 1933, as amended by the Act approved March 26, 1935, Acts of 1935, Page 127, be further amended by striking in its entirety Section 92-3113, as amended and inserting in lieu thereof the following:

" '92-3113. Corporation; Allocation and Apportionment of Income. The tax imposed by this law shall apply to the entire net income, as herein defined, received by every domestic corporation, and every foreign corporation owning property or doing business in this State.

" '(a) If the entire business income of the corporation is derived from property owned or business done in the State, the tax shall be imposed on the entire business income, but if the business income of the corporation is derived in part from property owned or business done in the State and in part from property owned or business done without the State, the tax shall be imposed only on the portion of

the business income reasonably attributable to the property owned and business done within the State, to be determined as follows:

" '(1) Interest received on bonds and dividends received on stocks held for investment are not subject to allocation except as they may be used to reduce apportionable interest paid. Rentals received from real estate held purely for investment purposes and not used in the operation of the business are not subject to apportionment. All expenses connected with the interest, dividends, and rentals realized from investments such as the above are not subject to apportionment, but must be applied against the investment income. The taxability of the net investment income depends upon the situs of the investment property or the situs of the corporation.

" '(2) Gains from the sale of tangible or intangible property not held, owned, or used in connection with the trade or business of the corporation, nor for sale in the regular course of business shall be allocated to the State if the property sold is real or tangible personal property situated in the State or intangible property not connected with the business in the State; otherwise such gains shall be allocated outside the State.

" '(3) Net income of the above classes having been separately allocated and deducted as above provided, the remainder of the net business income of a corporation shall be allocated and apportioned as follows:

" 'a. Where income is derived principally from the holding and/or sale of intangible property, having a taxable situs in this State, the tax shall be imposed on the entire business income; if a portion of such intangible property has a taxable situs without the State, the portion of the income derived from the holding and/or sale of such property attributable to this State shall be taken to be such percentage as the gross receipts from such intangible property in this State for the taxable year bear to the total gross receipts from such sources; Provided, that the taxable situs of intangible property held or owned by any

domestic corporation or by any foreign corporation whose principal place of business is in Georgia, shall be deemed to be in the State of Georgia, notwithstanding any domicile of any such corporation established elsewhere.

" 'b. Where income is derived from business other than the manufacture or sale of tangible personal property, or from the holding or sale of intangible property, or the conduct of a public utility, the portion thereof attributable to business within the State shall be taken to be such percentage of the total of such income as the tangible personal property owned, held, or used in the State in the conduct of such business and expense within the State of conducting the business bear to the total tangible personal property and total expense of conducting the business and the two percentages averaged; Provided: that if such corporation is a domestic corporation, or a domesticated or foreign corporation having its principal place of business within this State, all salaries paid general officers shall be deemed expenses within the State of conducting such business irrespective of the place of residence of any such officer or the place of actual payment of such salary. Provided further, that if such corporation uses or employs in the conduct of its business tangible property held or owned by such corporation other than tangible personal property, the reasonable annual rental value thereof, not exceeding ten per cent. of the cost of said property, shall for the purposes of this section be deemed a part of the expense of conducting such business.

" 'c. Where income is derived from the manufacture or sale of tangible personal property, the portion thereof attributable to business within the State shall be taken to be such percentage of the total of such income apportionable to Georgia determined as follows:

" '1. Tangible property ratio. The ratio of the tangible property, real, personal, and mixed, owned and used by the taxpayer in Georgia in connection with the trade or business during the income year to the total of such tangible property of the taxpayer owned and used in connection with the trade or business everywhere. Cash on hand or in

bank, shares of stocks, notes, bonds, accounts receivable or other evidence of indebtedness, special privileges, franchises, patents, and good will; or property, the income from which is not taxable or is specifically allocated shall not be considered tangible property nor included in the apportionment.

"'2. Manufacturing cost ratio. The ratio of the total cost of manufacturing, collecting, assembling or processing within this State to the total cost of manufacturing, collecting, assembling or processing everywhere. The term "cost of manufacturing, collecting, assembling, or processing within this State and everywhere" as used herein shall be interpreted in a manner to conform as nearly as may be possible to the best accounting practice in the trade or business, unless, in the opinion of the Revenue Commission, the peculiar circumstances in any case justify a different treatment. This term shall be generally interpreted to include as elements of cost within this State the following:

"'a. The total cost of all goods, materials, and supplies used in manufacturing, assembling, or processing within this State regardless of where purchased.

"'b. The total wages and salaries paid or incurred during the income year in this State in such manufacturing, assembling or processing activities.

"'c. The total overhead or manufacturing burden properly assignable according to good accounting practice to such manufacturing, assembling, or processing activities within this State including only such expenses as are allowable deductions for determining taxable net income as provided by this Act.

"'3. Sales ratio. The ratio of the total sales made through or by offices, agencies, or branches located in Georgia during the income year to the total net sales made everywhere during said income year. The tangible property ratio, the manufacturing cost ratio, and the sales ratio being separately determined and the three percentages averaged.

" 'd. Where income is derived principally from the holding and/or sale of tangible personal property having a taxable situs in this State, the taxable income shall be apportioned as follows:

" '1. Real estate and tangible personalty. The ratio of the value of its real estate and tangible personal property in this State on the date of the close of the income year of such company to the value of its entire real estate and tangible personal property then owned by it with no deduction on account of incumbrances thereon.

" '2. Sales. The ratio of the total sales made through or by its offices, agencies, or branches located in Georgia during the income year to the total sales made everywhere during said income year. The tangible property ratio and the sales ratio being separately determined and the two percentages averaged.

" 'e. Where one corporation owns stock in another corporation, the tangible property within or without the State, owned or held by any stockholder of any such corporation owning 50% or more of its capital stock, or by any other corporation in which the majority of the capital stock is held or owned by such taxpayer corporation or its stockholders, or any other corporation, controlled by such taxpayer corporation, or its stockholders, through ownership of stock or otherwise, and used or employed by such taxpayer corporation in the conduct of its business, shall be deemed the tangible property of such taxpayer corporation for the purposes of this section.' "

Filed in office November 4, 1944. K. C. Bleckley, C.S.C.Ga.

## APPENDIX "B"

SUPREME COURT OF GEORGIA

Decided October 13, 1944

No. 14971

PARKE, DAVIS & COMPANY,

vs.

COOK, State Revenue Commissioner

By THE COURT:

1. The suit for a refund of income tax, alleged to have been improperly collected, was properly brought in the superior court of Fulton County.

2. Sales made as those of the plaintiff in error were made in this case were properly classified as "Georgia sales," under the provisions of the Code, § 92-3113, as amended by the act of March 30, 1937.

3. The inclusion as "Georgia sales" of sales made as those of the plaintiff in error were made in this case did not violate the due-process clause or the commerce clause of the constitution of the United States, as being a tax on business carried on wholly in States other than Georgia.

4. The inclusion as "Georgia sales" of sales made as those of the plaintiff in error were made in this case, where shipments were made to customers in States other than Georgia, did not violate the due-process clause or the commerce clause of the constitution of the United States as being a burden on interstate commerce.

Parke, Davis and Company filed suit in Fulton superior court against J. Eugene Cook, as commissioner of revenue of the State of Georgia, in which substantially the following allegations were made: The plaintiff is a corporation of the State of Michigan, with its principal office in Detroit, and a general sales office at Baltimore, Mary-

land. Its business is that of manufacturing and selling pharmaceutical products and supplies. All manufacturing is done in States other than Georgia. Sales are made through salesmen, who are employed by and work under the supervision of the general sales manager at Baltimore, and travel the territory to which they are assigned. They are not authorized to make contracts, but take orders, which are forwarded to the Baltimore office for acceptance or rejection by the sales manager there. When an order is accepted, and a contract of purchase and sale thus results, shipment is made to the purchaser from the most convenient storage depot. The plaintiff maintains a stock of manufactured goods at Atlanta, Georgia, in a storage warehouse known as the Atlanta depot. The storekeeper in charge of this warehouse has no authority to accept orders for goods and does not receive or accept such orders. The accounts of customers are payable at Detroit or Baltimore, and the storekeeper at the Atlanta warehouse makes no collections. In the calendar year 1938 goods to the value of $462,441.02, and in the calendar year 1939 goods to the value of $521,560.40, were shipped from the Atlanta warehouse. All of these shipments were made pursuant to orders taken by the traveling salesmen and transmitted to Baltimore for acceptance or rejection, and on shipping instructions received by the storekeeper in charge of the Atlanta warehouse from the general sales office in Baltimore. Goods are shipped from the Atlanta warehouse only upon shipping instructions from the Baltimore sales office. Of the shipments made from Atlanta in 1938, goods to the value of $248,793.27 were shipped to purchasers within the State of Georgia; the remainder to customers in other States. In 1939, goods to the value of $249,770.95 were shipped from Atlanta to customers in Georgia, and the remainder to purchasers in other States. The State revenue commissioner assessed income taxes against the plaintiff for each of the years 1938 and 1939, by applying to its entire net income the apportionment formula prescribed by the act of March 30, 1937 (Ga. Laws 1937, pp. 109, 129; Code, § 92-3113). This formula provides for determining the taxable proportion of the entire business income of a

corporation doing business within and without the State by the use of three factors which are described as: (1) tangible-property ratio, (2) manufacturing and cost ratio, and (3) sales ratio. In making its return for 1938, and in computing the tax due, the plaintiff included as "Georgia sales" in the "sales-ratio" factor of the apportionment formula, all goods shipped to purchasers in Georgia from the Atlanta warehouse. This resulted in a tax which the plaintiff paid without complaint. The suit does not seek to recover this payment. The commissioner recomputed the tax by adding to "Georgia sales" in the "sales-ratio" factor of the apportionment formula all goods shipped from the Atlanta warehouse to purchasers in other States. This resulted in an additional assessment of $1337.63, which the plaintiff paid under protest, and filed an application for a refund. The application was denied and the suit was to recover this amount. For the year 1939, the commissioner again assessed income taxes against the plaintiff, following the method already described. Of the amount assessed, $1762.42 was because of the inclusion as "Georgia sales" in the "sales-ratio" factor of the apportionment formula shipments made from the Atlanta warehouse to purchasers within Georgia. This amount the plaintiff paid under protest, and applied for a refund. The application was denied and the suit also seeks to recover that amount. Of the additional assessment for 1939, $1597.30 was on account of the inclusion as "Georgia sales" in the "sales-ratio" factor of shipments made from the Atlanta warehouse to purchasers in States other than Georgia. This much of the assessment has not been paid, and the suit seeks to have it cancelled.

The defendant filed a general demurrer to the petition. The trial court sustained the general demurrer, and dismissed the petition. The exception is to this judgment.

WYATT, *Justice:*

1. The first question here for consideration is one of procedure. The petition is expressly brought under the Code, § 92-3310, which provides as follows: "No suit or proceedings shall be maintained in any court for the recov-

ery of any tax alleged to have been erroneously or illegally assessed or collected, or of any penalty or interest claimed to have been excessive or in any manner wrongfully collected, until a claim for refund has been duly filed with the State revenue commission; no such suit or proceeding shall be begun before the expiration of three months from the date of filing such claim, unless the commission renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax or penalty, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which suit or proceeding relates. The commission shall, within 90 days after any such disallowance, notify the taxpayer by mail." This Code section was codified from the 1931 income tax act. See Ga. L., 1931, Ex. Sess., p. 55, § 43.

The defendant in error contends that this proceeding is governed by the act for the "Administration of Taxing Laws" (Ga. L. Ex. Sess. 1937-38, p. 95, § 34(b)), reading as follows: "In any case in which it shall be determined that an erroneous or illegal collection of tax or license has been made by the commissioner, the taxpayer from whom such tax or license was collected may file a claim for refund with the said commissioner in writing and in such form and containing such information as the commissioner may require, to include a summary statement of the grounds upon which the taxpayer relies. In the event the taxpayer desires a conference or hearing before the commissioner in connection with any claim for refund, he shall so specify in writing in the claim, and if the claim conforms with the requirements of this section, the said commissioner shall grant such a conference at a time he shall specify. The commissioner shall consider information contained in taxpayer's claims for refund and such other information as may be available and shall approve or disapprove the taxpayer's claim and notify such taxpayer of his action. In the event any claim for refund is approved, the commissioner shall forthwith proceed under subsection (a) of this section to give effect to the terms thereof. Provided, further, that the taxpayer whose claim for refund is de-

nied by the commissioner under the terms of this act, shall have the right to sue for refund in the superior court of the county in which said taxpayer would have a right to appeal from a judgment by the Board of Tax Appeals, as in this case provided." It is contended that the general demurrer was properly sustained because the petition failed to show that the claim for refund was in writing as required by this section, and because the petition failed to show that there had been a legal determination that an erroneous or illegal collection of the tax by the commissioner had been made prior to the filing of the claim for refund. We deem it unnecessary to cite authorities for the well-settled principle of law in this State to the effect that, when an instrument is required by law to be in writing and a petition describes the instrument to be in compliance with the law, as against a general demurrer, the instrument will be presumed to be in writing.

We can understand the force of the argument that, before a claim for refund is filed with the revenue commissioner there should be a legal determination that the tax was erroneously or illegally collected by the commissioner. In the instant case, however, the petition alleges that payment of the tax was made under protest on January 20, 1942; and "promptly thereafter a claim was made for a refund thereof." The refund was not formally denied until January 4, 1944.

In 1941, the General Assembly of Georgia amended the tax act of 1938, limiting the jurisdiction of the Board of Tax Appeals to the review of assessments on tax returns for ad valorem taxes, and provided: "All cases, matters, claims, and controversies of whatsoever nature except those relating to the assessments of which jurisdiction in the State Board of Tax Appeals is retained by this act shall, upon the approval of this act, be recommitted to the State revenue commissioner who shall thereupon proceed to pass upon and determine any questions therein presented or involved. Any such ruling by the State revenue commissioner shall be subject to review by the courts as now provided for by said act of January 3rd, 1938, as fully as if such rulings had been reviewed by the State Board of Tax Appeals." Ga. L. 1941, p. 202, § 2.

Regardless of what was the state of the law on this question before the act of 1941, it seems clear that the above-quoted provisions of this act conferred upon the State revenue commissioner authority to determine in the first instance the question presented in the controversy now under consideration, and provided for a review of his ruling in the exact manner followed by the plaintiff in this case. To hold otherwise, would in fact close the doors of all courts and tribunals to the plaintiff in error with reference to any review of the ruling of the commission in the instant case; and that without any fault of negligence on its part. This result should and will be presented by this court. We hold that the proceeding and the suit for refund in this case have been properly brought.

2. The assignments of error are eight in number. However, the plaintiff in error, in its brief, very conveniently groups the questions raised into three divisions, and we thus deal with them in this opinion.

The first question, as stated by this brief, is as follows: "Does § 92-3113 of the Code as amended by the act of March 30, 1937, contemplate that there shall be included as 'Georgia sales' in the apportionment formula, sales made as the sales of the plaintiff are made? If it does so contemplate, is the department correct in construing the formula to require the inclusion as 'Georgia sales' of all sales made as those of the plaintiff are made, and completed by deliveries from the Atlanta storage warehouse in both interstate and intrastate commerce?"

So much of the Code, § 92-3113, as is here applicable reads as follows: "C. Where income is derived from the manufacture or sale of tangible personal property, the portion thereof attributable to business within the State shall be taken to be such percentage of the total of such income apportionable to Georgia determined as follows: 1. Tangible property ratio. The ratio of the tangible property, real and personal, and mixed, owned and used by the taxpayer in Georgia in connection with the trade or business during the income year to the total of such tangible property of the taxpayer owned and used in connection with the trade or business everywhere. Cash on hand or in bank,

shares of stocks, notes, bonds, accounts receivable or other evidence of indebtedness, special privileges, franchises, patents, and good will; or property, the income from which is not taxable or is specifically allocated shall not be considered tangible cost ratio. The ratio of the total cost of manufacturing, collecting, assembling or processing within this State to the total cost of manufacturing, collecting, assembling, or processing everywhere. The term 'cost of manufacturing, collecting, assembling, or processing within this State and everywhere' as used herein shall be interpreted in a manner to conform as nearly as may be possible, to the best accounting practices in the trade or business, unless, in the opinion of the revenue commission, the peculiar circumstances in any case justify a different treatment. This term shall be generally interpreted to include as elements of cost within this State the following: a. The total cost of all goods, materials, and supplies used in manufacturing, assembling, or processing within this State regardless of where purchased. b. The total wages and salaries paid or incurred during the income year in this State in such manufacturing, assembling, or processing activities. c. The total overhead or manufacturing burden properly assignable according to good accounting practice to such manufacturing, assembling, or processing activities within this State including only such expenses as are allowable deductions for determining taxable net income as provided by Part IX of this Title. 3. Sales ratio. The ratio of the total sales made through or by offices, agencies, or branches located in Georgia during the income year to the total net sales made everywhere during said income year. The tangible property ratio, the manufacturing cost ratio, and the sales ratio being separately determined and the three percentages averaged."

We are dealing here with the levy of a net income tax against a taxpayer which is engaged in a business extending over many States. The evident purpose of the act in question is to require the taxpayer to pay to the State of Georgia income tax on that portion of its business fairly attributable to its Georgia activities. The "sales ratio" of the taxing formula above-quoted is here brought in question. Do sales made in the manner alleged in the

petition, for the purpose of this act, levying a net-income tax on a proportionate basis, amount to "sales made through or by offices, agencies, or branches located in Georgia?" There is no contention that the plaintiff in error does not "own property or do business in this State." What is done in this State? A stock of goods is kept in a warehouse in Georgia; orders for goods are received and approved at the office of the corporation in Baltimore, Maryland, and forwarded to this warehouse; the orders are filled by the person in charge of the warehouse, and actual delivery of the goods is made in Georgia—in the case of residents by actual delivery to them, and in the case of non-residents by delivery to the common carrier, which is tantamount to delivery to the purchaser. Since delivery is made in Georgia to both Georgia purchasers and non-resident purchasers, in so far as shipments from the Georgia warehouse are concerned, title passes in Georgia as to both classes of purchasers. See Code, § 96-107; *Kehrer* v. *Stewart*, 117 Ga. 969; *Mann* v. *Glauber*, 96 Ga. 795.

By numerous decisions, this court is committed to the proposition that a corporation may not escape the payment of taxes on personal or tangible property located within the State of Georgia by maintaining a non-resident home office, and thereby creating the fiction of a non-resident tax situs for such property. We see no reason why the same reasoning as to the payment of income tax should not apply to a corporation doing business in many States; otherwise, the person or corporation thus engaged in business could split up its business activities so as to avoid paying its just share of the burden of income tax in all States.

We do not understand that there is any contention that a State cannot under any circumstances levy and collect a tax of the nature here in question. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, and a number of other decisions clearly support such right. We do hold that sales made in the manner described in this petition, both as to residents and non-residents of Georgia, in the sense used in this income tax act, amounted to "sales made through or by offices, agencies, or branches located in Georgia."

3. The second question argued in the brief of the plaintiff in error is as follows: "If § 92-3113 of the Code, properly construed, does provide that sales made as those of the plaintiff are made shall be included as 'Georgia sales' in the sales-ratio factor of the formula of apportionment, does the act for that reason offend the due-process clause of the fourteenth amendment of the constitution of the United States, or the commerce clause of the constitution of the United States, because the effect of the formula as so construed is to subject to taxation by the State property and business of the plaintiff carried on wholly in other States, or to burden interstate commerce?"

The question here raised is whether or not the income tax act as applied in the instant case had the effect of taxing the business of the taxpayer carried on wholly in other States, and thus became a burden upon interstate commerce. If the State of Georgia had the authority to levy a fair income tax against the overall business of the taxpayer fairly proportionate to its Georgia activities, and if the formula here adopted was based upon business done in Georgia or sales made in Georgia—and we have thus held—then, of course, the effect of the taxing formula was not to levy a tax on business of the plaintiff carried on wholly in other States, and we so hold.

4. The third question raised in the brief of the plaintiff in error is as follows: "If § 92-3113 of the Code, as amended, properly construed, requires that sales of plaintiff which are completed by shipments from the Atlanta warehouse to customers in other States be included as 'Georgia sales' in the sales-ratio factor of the apportionment formula, does the section, as so construed, offend the due-process clause of the fourteenth amendment or the commerce clause of the Federal constitution, for the reasons indicated in the foregoing paragraph?"

We have held in this opinion that shipments made from the Georgia warehouse to non-residents of Georgia were, for the purposes of the statute now under consideration, upon the same basis as shipments to Georgia purchasers. In so far as the taxpayer in this case is concerned, identically the same acts were performed as to non-resident

purchasers as were performed as to resident purchasers, the only different being that in the case of non-resident purchasers the goods were carried by common carrier across State lines. This was not true in the case of resident purchasers. We think that this makes no difference in so far as the constitutional questions here raised are concerned.

American Steel and Wire Co. v. Speed (192 U. S. 500) holds in effect that a State not precluded by the commerce clause of the Federal constitution from imposing a merchant's tax upon a non-resident manfacturing corporation which has selected a city of that State as a distributing point, and has secured a local transfer company to take charge of its products when shipped to that point, assort them, store them in a warehouse, and make delivery in the original packages to the customers of the manufacturer, either as expressly directed by it, or under general directions in favor of its recognized and approved customers, whose names were furnished to the transfer company, since, under such circumstances, the goods, when stored in the warehouse, were no longer in transit, but had reached their destination, and were held in the State for sale.

"A State, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation of the net income derived from transactions in interstate commerce, without contravening the commerce clause of the Federal constitution, where there is no discrimination against interstate commerce either in the admeasurement of the tax or in the means adopted for enforcit." U. S. Glue Co. v. Oak Creek, U. S. (62 L. ed. 1135). See also Underwood Typewriter Co. v. Chamberlain, U. S. (65 L. ed. 165); International Harvester Co. v. Wisconsin Dept. of Taxation (decided by the United States Supreme Court on May 29, 1844, and not yet published). There are many cases laying down the same principle of law as discussed in the above-cited decisions.

In the instant case, it appears that the income tax act in question simply levied a tax on the business of a corporation, and, in order to reach a fair and reasonable ratio, included in the computation the net income derived from

transactions in interstate commerce, but did not discriminate against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing the tax. Therefore we hold that the tax act in question did not amount to a burden on interstate commerce, or violate any constitutional provision under the questions raised by the plaintiff in error.

It follows that there was no error in sustaining the general demurrer and dismissing the petition.

Judgment affirmed. All the Justices concur.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

Number 713

PARKE, DAVIS AND COMPANY,
Appellant,

versus

J. EUGENE COOK, as Commissioner of the State Revenue Department,
Appellee.

Appeal from the Supreme Court of Georgia.

## REPLY TO APPELLEE'S MOTION TO AFFIRM OR DISMISS.

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December 2, 1944.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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IN THE

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OCTOBER TERM, 1944.

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Number .....

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PARKE, DAVIS AND COMPANY,
Appellant,

versus

J. EUGENE COOK, as Commissioner of the
State Revenue Department,
Appellee.

---

Appeal from the Supreme Court of Georgia.

---

## REPLY TO APPELLEE'S MOTION TO AFFIRM OR DISMISS.

---

### STATEMENT OF THE CASE.

This case was brought in the Superior Court of Fulton County, Georgia, was determined on a general demurrer, and the decision of that Court was affirmed by the Supreme Court of the State of Georgia, which held that under the facts accepted as true on demurrer, appellant was subject to the tax involved in this proceeding.

All of appellant's contracts of sale are made in Baltimore, Maryland, from orders sent thereto by salesmen working under, and paid by, that office. All goods under such contracts are paid for by remittance to the Baltimore office.

Appellant is a large manufacturing corporation, selling its own manufactured goods. Its home office is Detroit, Michigan, and its principal sales office is in Baltimore, Maryland. It sells its goods throughout the United States and in foreign countries. For the purpose of lessening freight charges, appellant maintains a warehouse in Atlanta, Georgia, from which, on orders sent from the Baltimore sales office, shipments are made over rail carriers to the purchasers under the contracts made at Baltimore. These shipments from the Atlanta warehouse go, some to points in Georgia, and some to points in other states.

The Georgia statute under which the taxes here involved were assessed is copied with the Jurisdictional Statement heretofore filed **(Georgia Laws 1937, pages 109, 129; Georgia Code of 1933, Section 92-3113)**. This statute provides for a formula for determining the taxable proportion of the entire business income of a corporation doing business within and without the State by the use of three factors, which are described as (1) tangible property ratio, (2) manufacturing and cost ratio, and (3) sales ratio.

Appellant admittedly manufactures nothing in Georgia, and it alleges in its original petition in the trial court that no sales are made in Georgia. It has tangible property in Georgia on which it pays ad valorem taxes. The Georgia Income Tax Act of 1931, as amended **(Georgia Code, Secs. 92-3102, 92-3113)**, purports to tax foreign corporations only upon net income "from property owned or from business done in Georgia" on "sales made through or by offices, agencies or branches located in Georgia." The sales ratio factor in the statute is in this language:

"The ratio of the total sales made through or by offices, agencies or branches located in Georgia during the income year to the total net sales made everywhere during said income year."

For the year 1938, in making its return and in computing the tax due, appellant included as "Georgia sales" in the "sales ratio" factor of the apportionment formula, all goods shipped to purchasers in Georgia from the Atlanta warehouse. This resulted in a tax which appellant paid without complaint. The suit does not seek to recover this payment, because, as alleged by appellant, it had not at that time been advised by counsel of its legal rights. The Commissioner recomputed the tax by adding to "Georgia sales" in the "sales ratio" factor of the apportionment formula all goods shipped from the Atlanta warehouse to purchasers in other States. This resulted in an additional assessment of $1,337.63, which appellant paid under protest, and filed application for refund. For the year 1939, the Commissioner again assessed income taxes against appellant. Of the amount assessed, $1,763.42 was because of the inclusion as "Georgia sales" in the "sales ratio" factor of the apportionment formula shipments made from the Atlanta warehouse to purchasers within Georgia. This amount plaintiff paid under protest and applied for refund. The application was denied and the suit seeks to recover these amounts. A further assessment for 1939, $1,597.30, was made on account of the inclusion as "Georgia sales" in the "sales ratio" factor of shipments made from the Atlanta warehouse to purchasers in States other than Georgia. This much of the assessment has not been paid, and the suit seeks to have it canceled.

There is here involved two kinds of claims. One, that shipments, under the facts alleged, to points in Georgia, and the other, that shipments to points in States outside of

Georgia, cannot be considered or taxed under the Commerce Clause, and are arbitrary and unlawful under the due process and equal protection clauses of the Constitution of the United States.

## ASSIGNMENTS OF ERROR.

The errors assigned in the Supreme Court of Georgia, and again relied on here, may be summarized:

The Supreme Court of Georgia erred in holding that the sales described in the petition of appellant as amended came within the meaning of the Georgia law of "sales made through or by offices, agencies or branches located in Georgia."

The Supreme Court of Georgia erred in not holding that the statute, Section 92-3113, as amended and applied, violated the Commerce Clause of the Constitution of the United States.

The Supreme Court of Georgia erred in not holding that said statute under which the tax was assessed against appellant, is void as so applied because violative of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

## THE FORMULA, AS APPLIED TO APPELLANT'S BUSINESS, IS ARBITRARY AND VOID.

It is recognized that a formula could be devised which would be free from arbitrariness. Such a formula, however, in order to be just and lawful, would have to divide the interstate and intrastate business by the use of factors found in both classes of business. Under the facts here, there are only three factors which are common to the business done in Georgia and the interstate business. These are: value of real property, value of personal property stored in warehouse, and wages paid.

Appellant owns real property in Atlanta. It stores some property in its warehouse in Atlanta, and it pays wages to its warehousemen in Atlanta. Similar real and personal property is also owned and wages paid in states other than Georgia. If these factors, common to both classes of business, were used, the formula would be the combined common factors in Georgia, described as x, and the combined common factors outside of Georgia, described as y, and the formula would be, as x is to y, so is the Georgia tax to the total net income.

Such a legal formula, however, was not used. Here the formula includes sales, none of which are made in Georgia, and is based upon interstate sales which do not fairly reflect net profits. The total sales used in the formula applied to appellants, if yielding any profit, which is not always true of sales, do not reflect profits derived from manufacturing, which is the chief business of appellant. Before appellant can be taxed under all the decisions, there must be a clear statutory authority therefor.

Ordinarily, as we recognize, the decision of a State court construing a State statute, is binding upon this Court. But, when such construction by the State Court attributes as a meaning of the State statute a rule in violation of the Constitution of the United States, a federal

question is involved, and it is respectfully submitted that the State court erred in holding that the statute applies here. A holding that it does apply presents a conclusion that makes the statute arbitrary and in violation of the Fourteenth Amendment to the Constitution of the United States.

The facts alleged in the petition necessarily follow the rules of pleading, and state ultimate facts. Details of the methods of doing business should be known in the determination of any constitutional question, and such determination should not ordinarily be had on a general demurrer.

## GROSS INCOME IS AN IMPROPER FACTOR IN ARRIVING AT A DIVISION OF EARNINGS, INTERSTATE AND INTRASTATE.

The reason gross income is not used, and why its use has been so frequently condemned by this Court, is that gross income does not necessarily result in net income, nor is there any fixed relationship between gross and net income. The formula applied by the State is based on assumptions unsupported by any fact. It is assumed, in this formula, that no profits are made from manufacturing the articles sold, and that sales everywhere not only yield profits, but similar profits.

These unproved assumptions are contrary to experience, and make the application of the formula unfair and arbitrary. If there are profits from manufacturing, sales from one warehouse, disconnected from any manufacturing, should not be equalized with total sales which are of goods manufactured elsewhere.

## NO SALES WERE MADE IN GEORGIA.

The Supreme Court of Georgia held that when a contract of sale was made outside of Georgia, and goods were shipped to a warehouse in Georgia from another State, and then delivered by the warehouse, on such contract of sale, to a resident of Georgia, the sale was made in Georgia. It also held that the same rule applied when a delivery was made to a State other than Georgia. These findings seem to be in principle contradictory, and the Court, we submit, erred in holding that the sales were made in Georgia.

For this holding, the Court cited: **Georgia Code, 1933, Section 96-107**; **Kehrer v. Stewart, 117 Ga. 969**; and **Mann v. Glauber, 96 Ga. 795.** Extensive discussion of these citations is unnecessary. It suffices to say that **Code Section 96-107** merely lays down a rule which, says the section, "the intention of the parties to a contract may dispense with." Here, the allegations show that the contract was not a Georgia contract.

The **Kehrer case**, also cited by the Court, we submit announces a rule in conflict with the Supreme Court's decision herein. In the **Kehrer case**, an occupation tax was involved. There was no question of any formula based upon relative sales. The Supreme Court in that case, at page 973 of its opinion, cited several cases, including **Stone v. State, 117 Ga. 292. Stone v. State** deals with a situation almost exactly similar to the one here. There, the Supreme Court said that the transaction showed that the party was engaged "in interstate commerce." After the case cited at page 973 of its opinion in the **Kehrer case**, the Court decided a principle which, if applied here, means that the Supreme Court was wrong in the instant case. The Supreme Court of Georgia there said:

> "Under these rulings, by which we are bound, that part of Nelson Morris & Company's business which

consisted in shipping goods to Atlanta to fill orders previously received, the goods being delivered in accordance with such orders, was interstate commerce. It was, therefore, not subject to taxation or interference by the State, and an act seeking to impose any tax upon such a business would be unconstitutional and void. The occupation of the plaintiff in error as agent for the conduct of this part of the business is so closely and directly connected therewith that, in so far as the tax act seeks to tax him as such agent, the act is void."

This Court affirmed the Supreme Court of Georgia in the **Kehrer case, 197 U. S. 60, 65.** This Court, in so affirming the Georgia Court, at page 65, showed the differences in the facts of that case and the instant case.

## CASES RELATING TO THE USE OF GROSS INCOME AS A BASIS FOR DIVIDING INTRASTATE AND INTERSTATE EARNINGS.

This is a controlling issue in the instant case, and the question is discussed in the statement of jurisdiction filed herein. To that statement is attached the opinion of the Supreme Court of Georgia, which has not yet been reported, and the applicable statutory provisions. There is also cited the leading cases referring to gross income. These are: **Crew Levick Co. v. Pennsylvania, 245 U. S. 292; J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307; Gwin, White & Prince v. Henneford, 305 U. S. 434.**

We also, in the statement of jurisdiction, cited other cases conflicting, as we submit, with the decision of the Supreme Court of Georgia in this case. Briefly, we shall now refer to the cases relied upon by the Supreme Court of Georgia in the decision in this case.

**American Steel and Wire Company v. Speed, 192 U. S. 500:** This case dealt with a merchants' tax, and is not ap-

plicable to a formula for distributing income between interstate and intrastate transactions. In the **Steel case**, the taxpayer held its property "in the state of sale." This property was "there held in store at the risk of the Steel Company, to be sold and delivered as contracts for the purchase were completely consummated." The merchants' tax there levied applied to all merchants in exactly the same way. There was no question about the taxpayer being a merchant. There is no resemblance between the principles there involved and the principles here involved.

In the concurring opinion of Mr. Justice White in **Pullman Company v. Kansas (1910), 210 U. S. 56, 64, seq.**, there is an elaborate discussion, applicable to the case here, and there is also a dissenting opinion by Mr. Justice Holmes. These opinions sufficiently distinguish the character of a case like the **Steel and Wire case** from this case.

The next case cited by the Supreme Court of Georgia in this case is **United States Glue Company v. Oak Creek, 247 U. S. 321.** In the **Oak Creek case**, this Court called attention to the fact that that case involved a domestic corporation (page 326). There, said the Court, at the same page, the tax was on the privilege of exercising a franchise, and "the amount is made dependent in fact upon the value of its property situated within the State." If, in the instant case, the tax had been made dependent upon the value of the taxpayer's property in Georgia, the amount of the tax would have been but a few dollars. In the **Oak Creek case**, the Court referred to and designated as "the correct line of distinction," the **Crew-Levick case**, above, and said that in that case this Court had held "that a state tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions in such commerce, was by its necessary effect

a tax upon the commerce . . ." (page 328). Further discussing the question of gross receipts, at **page 329**, the Court in the **Oak Creek case**, said:

> "A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce."

The next case cited by the Supreme Court of Georgia is **Underwood Typewriter Company v. Chamberlain, 254 U. S. 113.** There this Court again cited the **Adams case**, above, called attention to the fact that the case under consideration involved a tax "based upon the net profits earned within the State," and said:

> "That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce, is settled."

The Court was there dealing with a property tax, or franchise tax (see page 120). There, at page 121, this Court held that the

> "method of apportionment * * * was meant to reach only the profits earned within the State."

Next, the Supreme Court of Georgia cited **International Harvester Company v. Wisconsin, May 15, 1944, ... U. S. ..., 88 L. ed. adv. pamp. 905.** Properly to appraise **International Harvester case**, the decision therein should be considered in connection with other cases decided the same day. See **McLeod v. Dilworth Company** and **General Trading Company v. Tax Commission.** These three cases, decided at the same time, and in which concurring and dissenting opinions were filed, discussed at length the

question of distributing a tax when the taxpayer is engaged both in interstate and intrastate business. It will be noticed that in the opinion of the Court in the **Harvester case**, the **Adams case** is again cited and followed. It will also be noticed that, contrary to the facts here, the Court found in the **Harvester case** that "both the agreement to sell and the delivery took place in Indiana." That "both buyer and seller were in Indiana and payments were made in Indiana"; that the tax there was not "an attempted tax on the gross profits of interstate sales by both the State of the buyer and the State of the seller."

In the **McLeod case**, the Court held that "a boundary line is none the worse for being narrow." The sale there was made similarly to the sales here. The sale there was in Tennessee; the sale here was in Maryland. The delivery there was in Arkansas, which sought to tax. The delivery here, as to part of the transactions, was in Georgia, which also seeks to tax. If Arkansas can tax under the circumstances, then every State in which a delivery is made of shipments from Georgia could likewise tax the transaction. What was said in the **McLeod case** applies here. Here (page 911, Advance Pamp.) the Court said:

> "* * * in this case the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction."

This Court also said:

> "The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States" (page 912).

The **General Trading Company case** dealt with a use tax, which is not the kind of tax here sought to be recovered. In dissenting, Mr. Justice Jackson said:

> "The transaction of sale is not taxed, and being clearly in interstate commerce, is not taxable."

In the instant case we seek a holding that the transaction of sale cannot be taxed because interstate commerce is not taxable.

In the **McLeod case**, in dissenting, Mr. Justice Rutledge refers to the **Adams case** above and cites **McGoldrick v. Berwind-White Coal Company (1940), 309 U. S. 33.** In the **Coal case** this Court again cites with approval the **Adams case**, and holds:

> "That a State tax upon the operations of interstate commerce, measured either by its volume or the gross receipts derived from it, has been held to infringe the Commerce Clause."

Appellee in his motion cites **Shaffer v. Carter, 252 U. S. 37, 57,** and **State Revenue Commission v. Edgar Brothers, 185 Ga. 216.** Neither of these cases was relied on by the Court below and neither conflicts with our contention here. The first of these refers to and approves the **Crew-Levick case**, on which we rely. The second deals with a statute different from the one here involved, and pages 217, 224 and 225 deal with mining in Georgia.

Appellee relies on **Gwin, White & Prince v. Henneford**, cited hereinabove. In this case the tax was held invalid because (see page 438) measured by the gross income. This Court said:

> "Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit **transported from Washington to purchasers elsewhere**; so that the tax, though

nominally imposed upon appellant's activities in Washington, **by the very method of its measurement reaches the entire interstate commerce service** rendered both within and without the state and burdens the commerce in direct proportion to its volume." (Emphasis supplied.)

It is respectfully submitted that the Supreme Court of Georgia in the instant case failed to follow the decisions of this Court, and that the cause should be reversed and remanded.

B. D. MURPHY,

EDGAR WATKINS,
Attorneys for Appellant.

December 2, 1944.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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# No. 713

---

PARKE, DAVIS AND COMPANY,
*Appellant,*

*vs.*

J. EUGENE COOK, STATE REVENUE COMMISSIONER

---

APPEAL FROM THE SUPREME COURT OF GEORGIA

---

## MOTION TO DISMISS OR AFFIRM

---

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CLAUDE SHAW,
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VICTOR DAVIDSON,
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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1944**

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# No. 713

---

PARKE, DAVIS AND COMPANY,
*Appellant,*

*vs.*

J. EUGENE COOK, STATE REVENUE COMMISSIONER,
*Appellee*

---

APPEAL FROM THE SUPREME COURT OF GEORGIA

---

## MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT OF STATE SUPREME COURT

---

Now comes J. Eugene Cook, Commissioner of Revenue of the State of Georgia, Appellee in the above styled case, and within fifteen days after being served with Appellant's appeal, moves the Court to dismiss said appeal pending from the Supreme Court of Georgia to this Honorable Court on the following grounds:

1

There is no substantial Federal question involved in this case which requires this Court to take jurisdiction of the controversy.

2

The Supreme Court of Georgia has correctly decided all issues in this case in accordance with State and Federal law.

Respectfully Submited, This November 15, 1944,

T. Grady Head,
*Attorney General;*
Claude Shaw,
*Asst. Atty. General;*
Victor Davidson,
*Asst. Atty. Gen.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

# No. 713

PARKE, DAVIS AND COMPANY,
*Appellant,*

*vs.*

J. EUGENE COOK, STATE REVENUE COMMISSIONER,
*Appellee*

APPEAL FROM THE SUPREME COURT OF GEORGIA

## BRIEF BY THE ATTORNEY GENERAL OF GEORGIA IN SUPPORT OF MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT OF STATE SUPREME COURT

The decision rendered by the Supreme Court of Georgia in this case definitely upholds the right of the State to levy a nondiscriminatory tax on net income derived from sales made within the State, even though the merchandise or goods are eventually shipped out of the State in interstate commerce. This ruling and adjudication of the Supreme Court of Georgia is clearly authorized by numerous decisions rendered by this Court. See,

*Underwood Typewriter Company* v. *Chamberlain*, 65 L. ed. p. 165;

*United States Glue Company* v. *Oak Creek*, 62 L. ed. p. 1135;

*Charles B. Shaffer* v. *Carter*, 64 L. ed. p. 445.

The decisions of this Court are uniform to the effect that a State may levy a nondiscriminatory tax on net income derived from transactions arising in interstate commerce. In *Charles B. Shaffer* v. *Carter, supra,* this Court held:

> "(7) A state income tax upon the net income of a nonresident from the business carried on by him in the state is not a burden on interstate commerce merely because the products of the business are shipped out of the state, since the tax, not being upon gross receipts, but only upon the net proceeds, is plainly sustainable even if it includes net gains from interstate commerce."

The Supreme Court of Georgia in its decision takes the position that the Income Tax Act of this State only taxes net income of nonresidents which is properly apportioned to business transactions occurring in this State as announced in the United States Supreme Court decisions above referred to. An examination of the Georgia statute will reveal that the State Supreme Court is correct in this decision. Section 92-3102 of the Georgia Code provides in part as follows:

> "The tax imposed by this law shall apply to the entire net income, as defined herein, received by every domestic corporation, and every foreign corporation owning property or doing business in this State:
>
> "If the entire business income of the corporation is derived from property owned or business done in the State, the tax shall be imposed on the entire business income, but if the business income of the corporation is derived in part from property owned or business done in the State and in part from property owned or business done without the State, the tax shall be imposed only on the portion of the business income reasonably attributable to the property owned and

business done within the State, to be determined as follows:

(c) Where income is derived from the manufacture or sale of tangible personal property, the portion thereof attributable to business within the State shall be taken to be such percentage of the total of such income apportionable to Georgia determined as follows:

(1) Tangible property * * *

(2) Manufacturing cost ratio * * *

(3) Sales ratio. The ratio of the total sales made through or by offices, agencies, or branches located in Georgia during the income year to the total net sales made everywhere during said income year. The tangible property ratio, the manufacturing cost ratio, and the sales ratio being separately determined and the three percentages averaged."

"The words 'sale or sales' wherever appearing in Part 9 of this Title for the purpose of apportioning net income to Georgia shall be deemed to be the total value of all sales made through or by the offices, agencies, or branches located within this State, regardless of the destination."

The State contends that the application of the above statute to the facts of this case is not an unconstitutional burden on interstate commerce. The Act in question only seeks to tax net income derived from business transacted in this State or from property located herein. Several other Georgia cases have definitely established this fact.

*Montag Bros., Inc.* v. *State Revenue Commission,* 50 Ga. App., p. 660;

*Interstate Bond Company* v. *Revenue Commission,* 50 Ga. App., p. 744.

We believe that this Court will not question the decisions rendered by the Georgia Supreme Court interpreting the

income tax statutes of this State unless it is clearly shown by Appellant that these decisions violate some constitutional right of the Appellant. It seems that it would be necessary for Appellant to actually show that the tax statute in question as applied by the State of Georgia resulted in the State taxing property beyond its jurisdiction, or discriminated against Appellant because it was engaging in interstate commerce. In the record, Appellant nowhere establishes the proposition that the use of the formula in question exacts an undue interference with its interstate business.

In *General Trading Company* v. *State Tax Commission*, No. 441, October Term, 1943, decided May 15, 1944, by this Court, it was held:

> "While no state can tax the privilege of doing interstate business, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce, does not exempt it from state taxation, so long as such taxation is not obviously hostile or practically discriminatory toward such commerce."

In *U. S. Glue Company* v. *Oak Creek*, 62 L. Ed., p. 1135, it was held:

> "A state, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce, without contravening the commerce clause of the Federal Constitution, where there is no discrimination against interstate commerce either in the admeasurement of the tax or in the means adopted for enforcing it."

On page 1141 of the Opinion the Court states:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, rec-

ognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the states."

In *Underwood Typewriter Company* v. *Chamberlain,* 65 L. ed. p. 165, it was held:

"(1) State taxation of a foreign manufacturing and trading corporation, measured by the net profits earned within the state, does not offend against the commerce clause of the Federal Constitution, whether deemed a property tax or a franchise tax, even though these profits may have been derived in part, or indeed mainly, from interstate commerce where payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business, but its enforcement is left to the ordinary means of collecting taxes."

"(3) Measuring for tax purposes the net profits earned by a foreign manufacturing and trading corporation within the state by taking such proportion of the whole net income as the fair cash value of the corporation's real and tangible personal property within the state bears to the fair cash value of all the real and tangible personal property of such corporation cannot be said to be so inherently arbitrary, nor, as applied to a corporation whose profits were largely earned in a series of transactions, beginning with manufacture in the state, and ending with sale in other states, to produce so unreasonable a result, as to render invalid the state law prescribing such rule, as taxing business outside the state, and hence denying due process of law, where the only showing made in support of this constitutional objection is that but a very small part of the corporation's net profits was received within the state, while, under the statutory method of apportionment, nearly one half of the corporation's net income is attributable to operations within the state, since the percentage of net profits earned within the state may, none the less, have been even larger than the percentage arrived at by the statutory method."

In 130 A. L. R. 1188, the rule relative to this subject is stated:

"Although a state may not constitutionally tax the income of a nonresident or a foreign corporation derived from sources outside of the taxing state (see Hans Rees Sons vs. N. C. 283 U. S. 123), it may tax the income of a nonresident or a foreign corporation derived from property or business transacted within the State."

In the *Hans Rees* case, the taxpayer sustained the burden of showing that the State by the application of its stautory method of application was taxing business transacted outside the State. Taxpayer showed that the income having its source in manufacturing and tanning operations in

North Carolina was 17%, while the amount allocated to North Carolina by the statutory method was approximately 80%. However, this same statutory method of allocation was subsequently upheld in *Maxwell* v. *Kent Coffee Company*, 204 N. C. 365, 90 A. L. R. 476, and affirmed by the United States Supreme Court in 78 L. ed. p. 1040, on the ground that the case was controlled by the decision in the *Underwood Typewriter Company* case (See page 1211 of 130 A. L. R.).

In a recent case decided by the United States Supreme Court on May 29, 1944, entitled *International Harvester Company* v. *Wisconsin Department of Taxation* (No. 620, October Term, 1943), it was held:

> "A state may constitutionally tax such part of the income of a nonresident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state."

The above stated case definitely shows that the State of Georgia is entitled to levy a tax on the net income derived from transactions or events which occur in this State. In this connection it should be noted that our Income Tax Act places a tax on NET income. In other words, before any apportionment takes place the net income of the taxpayer must first be computed. The taxpayer in his amendment clearly agrees with this proposition. In Paragraph 13 of the amendment taxpayer states that the income tax act is unconstitutional "because the same requires plaintiff to pay a NET income tax on account of manufacturing done in other States and business done in other States and in interstate commerce." We place the word "net" in large letters in order to show that our tax is based on net income rather than gross income.

Recently however, the courts have become more liberal in allowing states to levy a tax on gross income derived from interstate commerce transactions. In *International Harvester Company* v. *Department of Taxation,* decided May 15, 1944, by the United States Supreme Court, it was held:

> "Where a state seeks to tax gross receipts from interstate transactions consummated within its borders, its power to do so cannot be withheld on constituional grounds where it treats wholly local transactions the same way."

In this case there were three distinct types of transactions involved which were designated by the Court as follows:

> "Class C: Sales by branches located outside Indiana to dealers and users residing in Indiana. The orders were solicited in Indiana and the customers took delivery to themselves at the factories in Indiana to save time and expense of shipping.
>
> "Class D: Sales by branches located in Indiana to dealers and users residing outside of Indiana in which the customers came to Indiana and accepted delivery to themselves in this state.
>
> "Class E: Sales by branches located in Indiana to dealers and users residing in Indiana, in which the goods were shipped from points outside Indiana to customers in Indiana, pursuant to contracts so providing."

"The objections under the Commerce Clause and the Fourteenth Amendment to the tax on the receipts from the three classes of sales involved here are equally without merit.

"In the Wood Preserving Corporation Case contracts were made outside Indiana for the sale of railroad ties. The respondent-seller, a Delaware corporation with its principal place of business in Pennsylvania, obtained the ties from producers in Indiana and delivered them to the

buyer (Baltimore & Ohio Railroad Co.) in Indiana who immediately loaded them on cars and shipped them out of the State. Payments for the ties were made to the seller in Pennsylvania. We held that Indiana did not exceed its constitutional authority when it laid the tax on the receipts from those sales.

"We see no difference between the sales in the Wood Preserving Corp. Case and the Class C sales in the present one which is translatable into a difference in Indiana's power to tax. The fact that the sales in Class C are made by an out-of-state seller and that the contracts were made outside the State is not controlling. Here as in the Wood Preserving Corp. Case, delivery of the goods in Indiana is an adequate taxable event. When Indiana lays hold of that transaction and levies a tax on the receipts which accrue from it, Indiana is asserting authority over the fruits of a transaction consummated within its borders. • • • The Class D sales are sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes to Indiana, takes delivery there and transports the goods to another state. The Wood Preserving Corporation Case indicates that it is immaterial to the present issue that the goods are to be transported out of Indiana immediately on delivery. Moreover, both the agreement to sell and the delivery took place in Indiana. Those events would be adequate to sustain a sales tax by Indiana."

The Court in the last Paragraph of this case sums up its conclusion as follows:

> "We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way."

In the present case the taxpayer does not accuse the State of discriminating against interstate transactions. Our In-

come Tax Act treats intrastate and interstate transactions in exactly the same manner. This principle of discrimination against interstate commerce by a state is very ably stated in

*McGoldrick* v. *Berwind-White Coal Mining Company* 84 L. ed. p. 565,

as follows:

> "State taxes whose tendency is to prohibit interstate commerce or place it at a disadvantage as compared or in competition with intrastate commerce, or which discriminate against interstate commerce, are unconstitutional."
>
> "It is not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens merely because an incidental or consequential effect of the tax is an increase in the cost of doing business by them."

The above case also definitely affirms several previous cases cited in holding as follows:

> "A tax may be levied on net income wholly derived from interstate commerce."

In the case of

*Wood Preserving Corp.* v. *Dept. of Treasury,* 85 L. ed. p. 1188,

it was held:

> "A tax laid under a state gross income tax act upon a foreign corporation in respect of a sale and delivery by it in the state to a railroad company of railroad ties, is not invalid under the Federal Constitution as laid upon income received outside the state, although the purchase price was paid to the seller at its principal place of business in another state.

> "The fact that goods which a foreign corporation resold in a state were purchased there by it through orders given from its office outside the state, cannot affect the authority of the state to tax the gross income of the corporation from the resale, even where their delivery to the corporation and its delivery to its customer were simultaneous."

The Court, in the above stated case, also states the following general rule:

> "The difficulty of making an exact apportionment is apparent, and hence, when the state has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases."

In the present case we believe that Section 92-3113 of the Income Tax Act in setting forth its formula showing the three ratios to be considered in apportioning income to the State of Georgia where the taxpayer does business both within and without the State is not unconstitutional. The plaintiff in this case fails to show or allege any facts which would indicate that the application of this formula as to its business is unreasonable and arbitrary. Certainly, the mere fact that the sales in question may be stated to be interstate transactions would not be sufficient to deprive the State of using such sales in its apportionment formula, particularly where only the net income is subject to tax.

It is true that in certain decisions the Supreme Court of the United States has held that where a tax is laid directly on gross income derived from interstate transactions, that such a tax is an undue burden upon such commerce. In *J. D. Adams Manufacturing Company* v. *Storen* 82 L. ed. 1365, an *Indiana* case where the tax was applied to gross receipts derived by an Indiana corporation from sales in other states, the Court held that since the tax was laid directly upon gross receipts derived from interstate com-

merce, the same was unconstitutional. To the same effect, see *Gwin, White and Prince* v. *Hinneford* 305 U. S. 434, where the tax was measured by gross receipts, and the court pointed out the risk of multiple taxation where the tax was not apportioned to the activities carried on within the State. We agree with the principle of law announced in these cases and recognize the fact that a state cannot levy a gross income tax on interstate transactions where the tax does not have any reasonable application to the business conducted in the taxing state. However, these decisions do not in anywise conflict with the principle of law which permits a state to levy a tax on net income derived from interstate transactions. There is no discrimination in the admeasurement of the tax.

The Supreme Court of Georgia definitely held that the sales in question took place in this State, since delivery of the merchandise to the common carrier took place in Georgia. This is the Georgia rule as pronounced by Section 96-107 of the Code of Georgia and so applied by the Supreme Court of this State in *Kehrer* v. *Stewart*, 117 Ga. p. 969, and *Mann* v. *Clauber*, 96 Ga. p. 795, in addition to the decision rendered by the Georgia Court in the present case. We feel that this Court will give great weight to what our Supreme Court has said in reference to where the sales in question actually took place. In fact, this Court has already affirmed this question in the recent case of *Murray B. McLeod* v. *J. E. Dilworth Company*, decided February 4, 1944, No. 311, October Term 1943, in which the Court held:

> "(1) A sales tax may not, in view of the commerce clause, be imposed by a state on sales to residents of the state which are consummated by acceptance of orders in, and the shipment of goods from, another state, in which title passes upon delivery to the carrier (distinguishing McGoldrick v. Berwind-White Coal Min. Co. 309 U. S. 33, 60 S. Ct. 388, 128 ALR 875, 84

ALR 565; Wisconsin v. J. C. Penney Co. 311 U. S. 435, 61 S. Ct. 246, 130 ALR 1229, 85 L. ed. 267.)"

This Court agrees with the Georgia Court in holding that the sale takes place where title passes, and that title passes where delivery is made to the carrier. Since the sales are actually consummated in Georgia, it seems to us that no Federal question involving interstate commerce can properly arise in this case. Neither can any question arise involving the Fourteenth Amendment to the United States Constitution, since the State of Georgia is not levying a tax on a transaction occurring outside this State. For this reason, we respectfully submit that this Court should not take jurisdiction of this case since no substantial Federal issues are involved. In this connection, see, *American Steel and Wire Co.* v. *R. A. Speed* 48 L. ed. p. 538, where it was held:

> "A state is not precluded by the commerce clause of the Federal Constitution from imposing a merchant's tax upon a nonresident manufacturing corporation which has selected a city of that State as a distributing point, and has secured a local transfer company to take charge of its products when shipped to that point, assorted them, stored them in a warehouse, and make delivery in the original packages to the customers of the manufacturer, either as expressly directed by it, or under general directions in favor of its recognized and approved customers, whose names were furnished to the transfer company, since, under such circumstances, the goods, when stored in the warehouse, were no longer in transit, but had reached their destination, and were held in the state for sale."

We also call the court's attention to a previous decision rendered by the Supreme Court of Georgia in the case of *State Revenue Commission* v. *Edgar Bros.* 185 Ga. p. 216, in which the facts were very similar to those in the present

case. In the *Edgar Bros.* case, the taxpayer, a nonresident, was mining clay in this State and sending it out of the State to be processed and thence sold. All of the operations outside of mining took place without Georgia. The taxpayer had no office or place of business in this State, and all expenses were paid from the principal office located in New Jersey. None of the clay was shipped to any point in Georgia or sold to any customer in this State. The Commissioner of Revenue sought to levy a tax against taxpayer based on the income earned in this State as defined by the Georgia Income Tax Act of 1929. The 1929 Act did not actually set up an apportionment formula as the Income Tax Act now under consideration does, so it became necessary for the Commissioner to make his own formula. The formula prescribed by the Commissioner however, was in keeping with the formula later enacted by the Legislature as set forth in this Brief under Section 92-3113, supra. The Supreme Court of this State on page 221 of the decision, held:

> "A State has the power to tax the income of its resident and domestic corporations, derived from transactions both within and without the State, where there is no discrimination against interstate commerce either in the admeasurement of the tax or in the means adopted for enforcing it. U. S. Glue Company vs. Oak Creek, 247 U. S. 321. As to nonresidents an income tax may be levied upon income received from property within the State; and the fact that it may require activities of skill and management outside of the State to bring the income to fruition does not by reason of the commerce clause of the Federal constitution deprive the taxing State of jurisdiction to tax income which arises in its borders, or as to nonresidents doing business in a State and whose business is of a unitary character, as that of the taxpayer in the instant case, a tax may be levied based upon the entire net income, but apportioned to that part of the net income attribu-

table to business done in the taxing State, where the enforcement of such tax is left to the ordinary means of collecting taxes."

The second headnote to this decision reads as follows:

"(2) By a proper construction of Section 3 of the Act of 1929, in its relation to the act as a whole, it imposes an income tax on non-resident corporations doing business in this State, based upon the entire net income of such corporations, but apportioned to that part of such income as is attributable to business done in this State."

The Appellant appealed the decision of the *Edgar Brothers* case to this Court on the grounds that the statute and its application as made by the courts of this State, placed an undue burden on interstate commerce and was also in violation of the Fourteenth Amendment to the United States Constitution. The Supreme Court of the United States dismissed this appeal. See, 303 U. S. 626; 82 L. ed. p. 1088.

The case now before the Court is simply a repetition of the objections made to the taxing statute in the *Edgar Brothers* case, and such objections have already been squarely passed upon by this Court.

We also respectfully call the Court's attention to an exhaustive annotation on this subject in 130 A. L. R., beginning with page 1183.

In conclusion, we believe that our motion to dismiss or affirm the judgment of the Supreme Court of Georgia should be sustained because of the following propositions:

1. Appellant states that the Georgia Tax Act is unconstitutional because as applied to him it levies a tax on transactions without the jurisdiction of this State. An analysis of the record in this case discloses that the sales in question all occurred within this State and were therefore subject to the apportionment for-

mula as provided for by the Income Tax Act. To the effect that the sales took place in this State because of the fact that the merchandise were delivered to either the customer or the common carrier for delivery in this State, see,

Section 96-107 of the Code of Georgia;
*Kehrer* v. *Stewart,* 117 Ga. p. 969;
*Mann* v. *Clauber,* 96 Ga. p. 795,

and the decision of this Court rendered on May 15, 1944, in the case of *Murray B. McLeod* v. *J. E. Dilworth Company,* which recognizes and sustains the Georgia law in holding that title passes upon delivery to the carrier, and that this is where the sale is actually consummated. Since it is definitely shown that the sale occurred in the State of Georgia, then how can it be said that the State has violated the Fourteenth Amendment of the United States Constitution in attempting to tax a transaction occurring outside the State of Georgia? We respectfully submit that as we view the record, there is no Federal question properly raised as to this point, or if such a question should be said to be raised, the decision of the Supreme Court of Georgia is correct and should be affirmed by this Court.

(2) Appellant states that the appeal should be allowed because the Georgia statute exacts an undue burden on transactions occurring in interstate commerce. In order to sustain this position, Appellant cites several cases where a State attempted to levy a tax on gross income derived from interstate commerce and a tax which necessarily hindered and discriminated against such commerce. We respectfully submit that none of these cases apply to the one now under discussion, since the Georgia Tax Act clearly levies a tax only upon "Net" income as has been frequently held by decisions of this Court. For a summary of cases dealing with this subject, see annotation in *130 A. L. R.,* beginning at p. 1183. Appellant also recognizes the fact that the tax in question is based upon

net income in his pleadings. (See Paragraph 7 of the amended petition which is a part of this record.)

Since the United States decisions are uniform to the effect that a State may impose a nondiscriminatory tax on net income derived from interstate commerce, it clearly appears that the Supreme Court of Georgia was correct in rendering the decision in this case. For this reason, we say, that no substantial Federal issue is involved, or if such issue should be involved, it has already been settled favorable to the State of Georgia in numerous United States decisions, and therefore the judgment rendered by our Supreme Court should be affirmed.

(3) As we understand the case, this Court will not again hear the arguments advanced by Appellant in the State Court to the effect that the Georgia Income Tax Act does not levy a tax on the transactions now under consideration. Since this question involves the interpretation of a State law, as we understand it, this Court will abide by the decision rendered by the Georgia Supreme Court in construing this statute. See,

*General Trading Company* v. *State Tax Commission,*

decided by the United States Supreme Court on May 15, 1944.

Respectfully submitted,

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*Attorney General;*
CLAUDE SHAW,
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VICTOR DAVIDSON,
*Asst. Atty. Gen.*

No. 713. PARKE, DAVIS & Co. *v.* COOK, COMMISSIONER OF REVENUE. Appeal from the Supreme Court of Georgia. January 2, 1945. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 120–21, and cases cited; *International Harvester Co.* v. *Wisconsin Department of Taxation*, 322 U. S. 435, 441–42; (2) *Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 282; *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362, 365–66; (3) *Interna-*

*tional Harvester Co.* v. *Department of Treasury*, 322 U. S. 340; *Department of Treasury* v. *Wood Corporation*, 313 U. S. 62; cf. *McLeod* v. *Dilworth Co.*, 322 U. S. 327. *Messrs. B. D. Murphy* and *Edgar Watkins* for appellant. *Messrs. T. Grady Head*, Attorney General of Georgia, *Claude Shaw* and *Victor Davidson*, Assistant Attorneys General, for appellee. Reported below: 198 Ga. 457, 31 S. E. 2d 728.